IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.232 OF 1997

The State of Maharashtra .. Appellant (Orig.Complainant)

Versus

Sayyed Arif Sayyed Pyare Hussain .. Respondent (Orig.Accused)

Mrs. U.V. Kejriwal APP for the State
Mr. A.P. Mundargi with Mr. I.R. Joshi, Advocate for the Respondent

CORAM : S.B. MHASE, & S.R. SATHE, JJ.
DATED : 19th JUNE, 2007

ORAL JUDGEMENT :- (PER S.R. SATHE,J.)

1. The State of Maharashtra has preferred this appeal against the judgement and order passed by the Court of Second Additional Sessions Judge, Malagaon in Sessions Case No.78/95, whereby the accused was acquitted of the offence punishable under section 307 of IPC.

2. The brief facts giving rise to this appeal are under.

The complainant Abdul Kayyam Haji Mohamed Ayub was residing at Malgaon. The injured Nizamuddin Haji Mohamed is the younger brother of the complainant. Both of them were residing separately. On the day of

incident, i.e. on 16/07/1995 two daughters of the injured had gone to the house of the complainant to watch television programme. The injured had therefore gone to the house of the complainant at night to bring his two daughters. At about 9.30 pm or so, the injured Nizamuddin and his two daughters started from the house of the complainant to go to their own house. When they reached near Mahebinnagar Square, the accused accosted them and started abusing the injured Nizamuddin. The accused asked him as to why he had intervened in the quarrel which had taken place between accused and his family members about 8 days prior to the incident. On so saying, the accused gave a blow with razor on the back side of the neck of Nizamuddin. He also gave another blow with razor on the chest. When the accused was about to give third blow injured raised his hand and he received the blow on his forearm. As a result of the above assault, the injured sustained bleeding injuries and fell on the ground. By that time, several persons gathered there. The two daughters of injured after seeing the incident went running to their house and gave information about the incident to their brother Arshad, who then in turn gave information to Rais Ahmed and he went to the house of the complainant and informed him about the incident. The complainant

Abdul Kayyam Haji Mohamed Ayub therefore immediately rushed to the spot i.e. Mahebinnagar Square. However, injured Nizamuddin was not there. When the complainant made query, he came to know that injured has been removed to Azad Nagar Police Station. He, therefore, went to Azad Nagar Police Station. There he came to know that injured has been taken to Wadia Hospital. Hence, complainant went to the said hospital. On reaching there, he came to know that as injured was serious, he was removed to Farhan Hospital, Malegaon. The complainant, therefore, went to Farhan Hospital. He found that injured was taken in the operation theater for some operation.

3. On 17/07/1995, the complainant went to Azadnagar Police Station and filed a complaint wherein he informed that he came to know about the alleged assault from Rais Ahmed and he told him that accused Arif assaulted Nizamuddin with razor. On the basis of the said complaint, Police registered the offence at C.R. No.136/95 against the accused for the offence punishable under section 326 of IPC.

4. On 17/07/1995, in the afternoon police went to the place of offence and drew the panchanam of the

place of offence. They also arrested the accused on the same day. On 20/07/1995, police attached the clothes of the injured. It is alleged that when accused was arrested on 17/07/1995 he produced one razor before police and it was attached under the panchanam Exh-38. After period of about 14 or 15 days police recorded the statement of alleged eye witness Naziya Mohammed as well as some other witnesses. They also recorded statement of the injured on 07/08/1995. Police sent the attached property to C.A.

5. After completion of the investigation, police submitted charge-sheet against the accused for the offence punishable under section 307 of IPC in the Court of JMFC, Malegaon.

6. Finding that the accused was charge-sheeted for the offence punishable under section 307 of IPC which was exclusively triable by the Court of Sessions, the learned JMFC committed the case to the Sessions Court, Malegaon.

7. The learned Second Additional Sessions Judge, Malegaon framed charge Exh-17 against the accused for the offence mentioned above. The charge was read over

and explained to the accused. The accused pleaded not guilty and claimed to be tried. His defence was of total denial.

8. In order to bring home the guilt of the accused, Prosecution examined in all 10 witnesses consisting of PW-1 complainant Abdul Kayyam Haji Mohamed Ayub Exh-33, PW-2 Dr. Bhimrao Tribhuvan Exh-35, PW-3 alleged eye witness Naziya Mohamed Exh-36, PW-4 panch witness Siraz Ahmed Ansari Exh-37, PW-5 another pancha witness Shaikh Jafar Exh-39, PW-6 Dr. Sayyed Ahmed Farani Exh-41, PW-7 Rais Ahmed Khalil Exh-43, PW-8 injured Nizamuddin Haji Mohamed Exh-44, PW-9 Investigating Officer PSI Ramrao Jogdande Exh-45 and PW-10 another investigating officer Suresh Ahirrao Exh-52. The Prosecution produced certain documents such as medical certificate of the injured Exh-25, Panchanama of the clothes of the injured Exh-26, C.A. Report Exh-27, FIR Exh-34. Panchanama of the attachment of the weapon i.e. razor Exh-38, arrest panchanama of accused Exh-40, medical certificate issued by doctor Exh-42. After considering the entire evidence adduced by the prosecution the learned Trial Judge came to the conclusion that there was delay in lodging the FIR and in recording statements of witnesses. The evidence with

regard to the attachment of the clothes of the accused and attachment of razor was doubtful. According to him, the evidence of the alleged eye witnesses Naziya and Rais was also not worthy of credence and the evidence of injured witness was not free from doubt. So, according to the learned Trial Judge, there was no sufficient evidence to prove beyond reasonable doubt that the injuries sustained by Nizamuddin were at the hands of the accused. Naturally, the learned Trial Judge acquitted the accused of the offence punishable under section 307 of IPC.

9. Being aggrieved by the said order of acquittal, the State has filed the present appeal. In this appeal before us, Mrs. U.V. Kejriwal, learned APP has urged only 3 points. Firstly, she submitted that the learned Trial Judge has given undue importance to the fact that there was delay in recording the statement. According to her, the learned Trial Judge erred in holding that delay in recording the complaint and recording the statements of witnesses was not satisfactorily explained by the prosecution. Secondly, she canvassed before us that the learned Trial Judge ought to have accepted the testimony of PW-3 Naziya Mohamed and injured witness Nizamuddin. Lastly, she submitted that

the learned Trial Judge has not properly appreciated the evidence on record and as such the appeal be allowed and the accused be convicted for the offence punishable under section 307 of IPC. As against this, Shri Mundargi, learned Senior Advocate for the accused supported the judgement and order passed by the learned Trial Judge. Firstly, he submitted that there are several infirmities in the prosecution evidence. There is delay in lodging FIR and recording the statement of alleged eye witness and that itself create grave doubt about the prosecution version. Secondly, he argued before us that the evidence with regard to attachment of the clothes of the accused and recovery of knife can not be relied upon and as such the C.A. Report has to be discarded. Lastly, he submitted that learned Trial Judge after considering the entire evidence and observing the demeanor of the witness has come to the conclusion that the evidence of the prosecution is not free from doubt and the benefit of doubt is rightly given to the accused. He, therefore, submitted that the view taken by the trial Court is a possible view and there is no need to interfere in the present appeal which is against the order of acquittal. He, therefore, submitted that the appeal be dismissed.

10. It is not in dispute that on 16/07/1995 at about 9.30 pm when Nizamuddin was proceeding from Mahebinnagar Square, he was attacked and he sustained severe injuries. He was intially taken to Azad Nagar Police Station and then he was sent to Wadia Hospital and from there to Farhan Hospital, Malegaon. Prosecution has produced at Exh-25 the medical certificate. From the perusal of the same, it is clear that at that time, it was noticed that Nizamuddin had sustained following injuries.

(1) Incised wound over neck on back size 5" x 1" x muscle deep

(2) Incised wound over chest wall on left. Size 5" x 1" x muscle deep

(3) Incised wound over left forearm 5" x 3" with cutting of Arteries 8 viens.

11. Doctor has opined that the said injuries were caused with sharp and cutting object and were within one hour. The main and the material question is whether the said injuries are caused by the accused before the Court.

12. In order to prove that the above mentioned injuries were caused by the accused, the Prosecution is

mainly relying on the evidence of two alleged eye witnesses namely PW-3 Naziya Mohamed, 13 years aged daughter of injured Nizamuddin and witness Rais Ahmed Khalil Exh-43. Besides this, the prosecution is ofcourse relying on the evidence of injured Nizamuddin which is at Exh-44. Before appreciating the evidence of the above mentioned 3 witnesses it would be worthwhile to see who lodged the complaint in the instant case and how the name of the accused was disclosed.

13. PW-1 Abdul Kayyam Haji Mohamed Ayub elder brother of Nizamuddin has filed the complaint at Exh-34 in the instant case. He has stated that on the day of incident at night when he was in his house one Rais Ahmed Khalil came to him and informed him that somebody has assaulted Nizamuddin with razor and he has sustained injuries. So, from this it is very clear that the complainant had in fact not come to know the name of the assailant from Rais. However, curiously enough if we see the evidence of witness Rais Ahmed Khalil which is at Exh-43. We find that he has stated that at the relevant time when he was passing by the road, he found that exchange of words was going on in between Nizamuddin and accused Arif and by the time, he reached near them Arif had fled away after assaulting

Nizamuddin by means of razor. By this statement it appears that according to Rais he had seen the accused while giving blow to Nizamuddin. However, this version of Raiz Ahmed is not at all corroborated by the complainant. If really Rais Ahmed had seen the accused assaulting Nizamuddin then he would have certainly disclosed the name of the accused to the complainant and complainant would have stated accordingly. But it is pertinent to note that the complainant has on the contrary stated that Raiz Ahmed told him that somebody assaulted Nizamuddin. So, this very material discrepancy and contradiction in the evidence of complainant and Rais Ahmed creates grave doubt about the creditability of the evidence of alleged eye witness Raiz Ahmed Khali. What is more to be noted is that the evidence of Raiz Ahmed is recorded 13 to 14 days after the incident. It is not the case that the said witness was not available during the said period. So, this delay in recording the statement of Rais Ahmed is another factor which shows that it is not safe under the circumstances of the case to accept his evidence.

14. The most important point is that when the statement of Rais Ahmed was recorded by Police, at that time, he had not stated before police that he informed

the complainant that Nizamuddin was assaulted by the accused. Not only that but he has also admitted that till the time police recorded his statement, he had not told anybody besides the complainant that accused assaulted Nizamuddin. However, even the Investigating Officer Jogdande Exh-45 has also stated that Raiz Ahmed had not stated before him that he informed the complainant that accused assaulted Nizamuddin. So, the learned Judge rightly came to the conclusion that it is not safe to accept the evidence of Raiz Ahmed.

15. From the perusal of the complaint Exh-34 it appears that the complainant has stated therein that he came to know about the name of the assailant from the son of injured. According to him, when he reached to the hospital, Nizamuddin's son Arshad was present there and he told him that accused assaulted Nizamuddin. Firstly, it must be noted that there is absolutely not an iota of evidence on record to show that at the relevant time Arshad was present at the place of offence. So, it is crystal clear that Arshad is in fact not an eye witness. Besides this, when in the complaint the complainant had stated that Arshad informed him the name of the assailant it was bounden duty of the Prosecution to examine Arshad. However, for the reasons

best known to the Prosecution the said witness has not been examined. Naturally, no importance can be attached to the statement of the complainant that Arshad informed him about the name of the assailant. Considering the evidence of the complainant and FIR lodged by him, we can not ignore the fact that this complaint has been lodged by the real brother of injured Nizamuddin after a period of about 14 hours from the time of incident. Admittedly, the police station is near from the place of offence. One may say that as the condition of Nizamuddin was critical and he was admitted in Farhan Hospital and operated there at night the complainant and the other near relatives might not have informed the police about the incident. But admittedly, the injured regained consciousness on the next day morning i.e. on 17/07/1995. So, at that point of time either the complainant or his son or other near relatives could have given information about the incident to Police, particularly when they had come to know the name of the assailant. But that has not happened. The complaint is lodged on 17/07/1995 at 2.10 pm. So, there is delay in lodging the FIR and the said delay is not at all explained by the Prosecution and naturally, it creates doubt about the Prosecution version.

16. Turning to the evidence of another eye witness Naziya Mohamed Exh-36, we find that she is a minor daughter of injured. Considering her relation with the injured, it must be said that she is an interested witness. Ofcourse, if it appears that she is a natural witness and at the relevant time, she was present, then due weightage shall have to be given to her evidence if the same is otherwise cogent, consistent and free from doubt. Naziya Mohamed has stated that on that day after watching television at the house of the complainant, she was returning with her father and her other sister namely Alia was also with them and at that time, accused accosted them and started speaking rudely with her father. She has further stated that at that time, the accused took out knife which was kept inside his shirt and inflicted blow on the neck of her father and second blow was given by him on the chest of Nizamuddin and he fell on the ground. She then went home and informed about the incident to her elder brother Arshad. Here again it must be noted that Arshad is not examined by the Prosecution. So, this non examination of Arshad creates doubt about the version of Naziya. Question arises whether really she had informed Arshad and if so why Arshad is not examined by the Prosecution. Incidently, it must also be noted that

though the complainant had stated that at the relevant time he was returning alongwith his daughter, he has not stated anything further. Then we find that this witness had stated before Police that at the relevant time there were in fact 3-4 persons who had accosted them and assaulted her father. Even Investigating Officer has stated that Naziya had stated accordingly when her statement was recorded. So, under the circumstances it creates doubt as to whether Nizamuddin was actually assaulted by the accused or by some other persons. All these discrepancies and contradictions carry more weight when we find that statement of Naziya was recorded by Police about 15 days after the incident. Admittedly, during this period Naziya was at Malegaon. There was no impediment in recording her statement earlier. If really it would have been disclosed that she was an eye witness to the incident then her statement would have been recorded immediately after the incident but that has not happened. So, there is delay in recording her statement and the said delay is not at all explained by the Prosecution. It is needles to say that there are various authoritative pronouncements wherein it has been observed by the Apex Court that the inordinate delay in registration of FIR and further delay in recording the statement of the

material witnesses, cast cloud of suspicion on the creditability of the entire warp and woof of the Prosecution story and the benefit of the same has to be given to the accused. For this proposition reliance can be placed on a case **Ganesh Bhavan Patel V/s. State of Maharashtra AIR 1979 Supreme Court 135**.

17. Apart from the evidence of the above mentioned two alleged eye witnesses and the complainant, prosecution is mainly relying on the evidence of injured Nizamuddin. It is an admitted fact that the accused was known to Nizamuddin prior to the incident. He has stated that on the day of incident the accused assaulted him with razor firstly on his neck and then on his chest and when he tried to avoid the 3rd blow it landed on his forearm and he sustained injuries. It must be noted that though the alleged incident had taken place on public road besides above mentioned alleged eye witnesses, there is no other witness to the incident. We find that near the place of offence, there are other shops so at the relevant time, normally there should have been some independent witnesses but in the instance case there is no such independent evidence. The injured has stated that 8 days prior to the incident there was some quarrel between accused and his

family members and at that time, he i.e. Nizamuddin had intervened and as a result of the same, the accused asked explanation about the same to Nizamuddin and then assaulted him. It must be noted that besides the bare word of Nizamuddin there is absolutely nothing on record to show that any such quarrel had in fact taken place 8 days prior to the incident and as a result of the same, accused was having any grudge or grievance against the injured Nizamuddin. We find that there is inordinate delay in recording the statement of injured Nizamuddin. It has come on record that immediately after the incident police had in fact made an attempt to record his statement by going to the hospital but at that time, Doctor informed police that Nizamuddin was not in a position to give statement. But that by itself is not sufficient to justify the delay caused in recording the statement of the injured. It is pertinent to note that Nizamuddin was discharged from the hospital on 25/07/1995. There is nothing on record to show that thereafter he was not available or not in a position to give any statement. Even then we find that his statement has been recorded on 07/08/1995. So, there is considerable delay in recording his statement. Thus, it must be noticed that in the instant case statements of the material witnesses have been recorded

after long time and as mentioned above it creates doubt. Even while appreciating the evidence of Naziya, the Trial Court who had an opportunity to mark the demeanor of Naziya has stated that he found that her evidence is not free from doubt. It is wroth to note that when injured was taken to Azadnagar Police Station even at that time injured had not disclosed the name of the assailant. It is true that he has stated that after he received the blow, he fell on the ground and became unconscious and when he regained consciousness, he found that he was in the hospital. When such was the position, it was necessary for the prosecution to bring on record as to who had initially taken the injured to Azadnagar Police Station. But that evidence is also lacking. Then, we find that when injured was taken to the Wadia Hospital, he himself had given history of assault to the Doctor. But even at that time he had not disclosed the name of the assailant. If really Nizamuddin was aware that the accused assaulted him then certainly he would have disclosed the name of the accused while giving the history. But that has not happened. On the contrary, we find that at both the hospitals i.e. at Wadia Hospital and Farhan hospital the injured had not given name of the assailant. On the contrary, if we see medical certificate Exh-42 issued

by Dr. Farhan therein also it is mentioned “History of assault by some one”. So, this evidence also negatives the prosecution version and lends support to the defence version that he has been falsely implicated. So, this evidence of injured Nizamuddin is also not cogent and consistent because it appears that he has also stated before Police that at the relevant time 3-4 persons had accosted him and amongst them there was accused. However, subsequently at the time of trial, he gave total goby to the said story. PSI Jogdande Investigating Officer has stated that the injured Nizamuddin had stated before him that at the relevant time 3-4 persons had accosted him. Considering this state of evidence, the learned Trial Judge did not accept the evidence of Nizamuddin.

18. It is tried to be argued before us that apart from the oral evidence there is circumstantial evidence which lends support to the Prosecution version. It is submitted that clothes of the accused were attached by the police and sent to C.A. and C.A. has opined vide Exh-27 that blood of 'B' group was found on the clothes of the accused and the blood group of the injured is also 'B'. However, if prosecution wants to take advantage of this circumstance then it absolutely

essential for the Prosecution first to establish that the clothes before the Court are of the accused and it must also be shown as to when and how the same were attached. An attempt was made by the Prosecution to show that these clothes were found on the person of the accused on 20/07/1995 and the same were attached under the panchanama Exh-40. However, firstly, the evidence in this behalf is not supported by the pancha witness. Secondly, it is an admitted fact that the accused was arrested on 17/07/1995. If really the clothes before the Court which were subsequently attached on 20/07/1995 would have been on the person of the accused then certainly police would have attached the same on that day. But we find that the clothes are in fact attached on 20/07/1995. So, this circumstance itself is sufficient to discard the Prosecution evidence in this behalf.

19. It is the Prosecution case that razor before the Court was used by the accused and when the same was attached and sent to C.A. Blood of 'B' group was found on the razor. However, the Prosecution has miserably failed to show that this razor was produced by the accused or discovered at the instance of the accused. Besides this, so far as injury which was found on the

hand of Nizamuddin is concerned, Doctor has opined that such injury can not be caused by the razor before the Court. So, we find that the evidence with regard to clothes of the accused as well as weapon alleged to have been used in the commission of offence is also not trustworthy.

20. Thus, taking into consideration several infirmities mentioned above in the Prosecution evidence the learned Trial Judge came to the conclusion that the Prosecution evidence is not trustworthy and the same is not sufficient to prove beyond reasonable doubt that accused assaulted Nizamuddin. After careful scrutiny of the entire evidence, we are also of the opinion that the evidence of alleged eye witnesses so also injured is not worthy of credence. It raises several doubts and the view taken by the learned Trial Judge is a possible view. It is needless to say that it is well settled that if two views are reasonably possible and the view favouring the accused is accepted by the Court below that is sufficient for upholding the order of acquittal. It is often said that in such cases presumption of innocence of the accused is further strengthened by acquittal. Here, finding recorded by the trial Court can not be said to be unreasonable,

perverse or not based on the evidence on record. There is nothing to show that it suffers from serious illegalities or misreading of the evidence on record. So, under the circumstances, we have no hesitation to hold that there is no need to interfere with the finding of acquittal recorded by the learned Trial Judge. Hence, we pass the following order:-

O R D E R

The appeal is dismissed.

The bail bond of the accused stands cancelled.

(S.R. SATHE,J.) **(S.B. MHASE,J.)**